IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-507

BOARD OF TRUSTEES OF PICKENS COUNTY SCHOOL DISTRICT, ET. AL.,

Petitioners,

versus

ANN MITCHELL,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I.

The Brief in Opposition gives the impression that Respondent was subjected to a decision-making process premised on the pregnancy policy which it quotes and discusses in some detail.[1] One of the critical factual disputes at trial was whether this pregnancy policy or the School District's anticipated absence policy had been the basis for decision in Mitchell's case.[2] The district court

[1] Br., at 2-3.

[2] In fact, the record showed that the pregnancy policy was a dead letter, thoroughly ignored by School District authorities. In some cases teachers taught up to a few days before delivery. See A. 158-171.

resolved that factual dispute in the School District's favor on substantial and virtually uncontradicted evidence.[3] The court of appeals did not overturn the district court's finding of fact as "clearly erroneous." *Zenith Corp. v. Hazeltine*, 395 U. S. 100 (1969). Therefore, it stands on appeal to this Court.

Likewise, the district court did not accept Respondent's factual contention that men were not required by the School District to report anticipated absences. Had it done so, Respondent would surely give a specific citation to this finding of fact. Respondent's statement that "a teacher who expected to be temporarily absent in the following year for some other medical reason, such as anticipated surgery, would not have to disclose that fact until after a new contract was granted"[4] is mere assertion on her part. The district court made no such finding, nor did Respondent introduce evidence of a single actual case to support this contention. Again, if evidence of an actual case existed on the record, Respondent assuredly would not be slow to cite chapter and verse in support of the assertion.

Significantly, the Respondent places almost no reliance on the district court's findings. Her references to the findings of the "court below" are to the opinion of the court of appeals.[5] But the district court, not the court of appeals, was the trier and finder of fact in the case. See *Zenith Corp. v. Hazeltine, supra*; *United States v. City of Bellevue*, 473 F.2d 473, 475 (8th Cir. 1973); *Phoenix Assurance Co. v. Singer*, 331 F.2d 10, 11 (8th Cir. 1964); Fed. R. Civ. P., Rule 52(a). The district court's findings were not set aside by the court of appeals. Therefore, Respondent is simply not at liberty to revive her factual theories after losing on the facts in the district court and

[3] See Pet., at 6, n.7.
[4] Br., at 3.
[5] See Br., at 2-3.

then, by an ingenious twist of rhetoric, assert that the School District's petition asks this Court to review factual issues.[6]

II.

For the reasons given in the Petition, we stand on our characterization of the district court's initial decision as one based on disparate treatment.[7] The Respondent's basic theory of the case from the very beginning of the district court action was that *she* had been *treated* differently than she otherwise would have been solely because of her pregnancy. Likewise, the reasoning behind the district court's initial Title VII opinion was that Mitchell, *as an individual*, would have been *treated* differently, but for her pregnancy. The reasoning had nothing to do with some claimed impact of the anticipated absence policy on women in general; it was bottomed on the treatment of Mitchell, and Mitchell alone, as a result of its application in her case. This seems to us too clear to be gainsaid.

In its second opinion, the district court rejected both the disparate treatment argument and the disparate impact argument as unsupported by the facts. Without purporting to disturb the district court on its fact finding, the court of appeals reversed on what we contend are erroneous legal theories. For the reasons set forth in our Petition, we believe these legal errors to be of sufficient importance and magnitude to warrant review by this Court.

[6] See Br., at 9.
[7] See Pet., at 8, n.9; 12, n.12.

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari and in this reply brief, the writ prayed for should be granted.

Respectfully submitted.

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